

From: Mandie, Laurence

Sent: Fri 7/02/2020 12:30 PM

To: LSCSubmissions

Subject: Submission on recommendations 2 and 3 in the Consultation paper on proposed amendments to the Legal Profession Uniform Law

Dear Legal Services Council,

Thank you for the opportunity to comment on the amendments to the Uniform Law proposed in your [January 2020 consultation paper](#). This submission addresses recommendations 2 and 3.

### **Summary**

Amending the definition of 'corporate legal practitioner' so that in-house counsel can provide legal services to all entities commonly found within a corporate group would be a most welcome improvement.

Unfortunately, the recommended drafting would not achieve this objective. Alternative drafting that better meets the policy objective should be considered.

### **Widening the definition of 'corporate practitioner' to reflect modern practice would advance the public policy objectives of the Uniform Law**

I welcome the Legal Service Council's acknowledgment that the current definition of 'corporate legal practitioner' does not permit corporate legal practitioners to provide legal services to all entities commonly found within a corporate group, and that it would be desirable to amend the definition to recognise the modern practice of in-house counsel and the array of contemporary business structures in which in-house counsel are engaged.

Amending the definition in this manner would better meet the Uniform Law's public policy objective of cutting red tape, and would better meet the needs of the consumers of in-house legal services.

The desirability of this approach was recognised by the Victorian Legal Service Board in a [letter to 'in-house counsel' dated 17 April 2019](#), in which the Board CEO and Commissioner wrote that "[w]e do not consider that an in-house counsel requires a principal practising certificate unless you are advising other clients outside of your employment arrangements such as for private clients, friends and family", and that "you and your employer are best placed to determine the entities related to your employer that you can properly advise in your role as in-house counsel".

Amending the Uniform Law so that an in-house lawyer does not need to obtain a principal practising certificate to advise his or her employer's corporate group would be of real benefit to in-house counsel and their employers. The benefits would include:

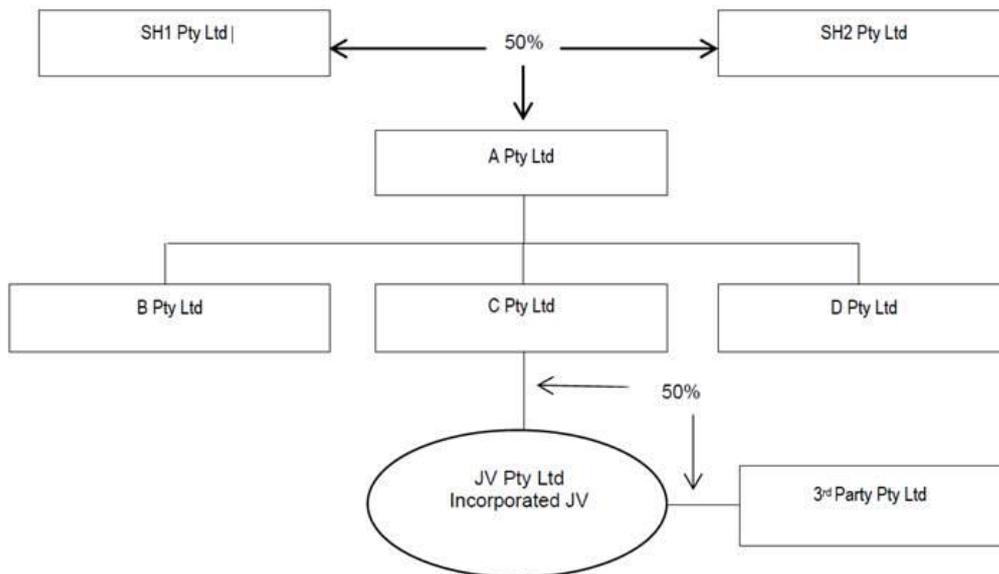
- reduced costs (for example, on practising certificates and indemnity insurance)
- time savings (for example, as a result of in-house counsel not needing to comply with obligations that apply to principals of a law practice for reasons of consumer protection)
- in-house counsel not being required to complete training in how to run a law firm (in order to obtain a principal practising certificate), at considerable cost in both time and course fees, and with minimal public or private benefit.

### **Proposed changes would not achieve the desired objective**

Unfortunately, the changes proposed in recommendations 2 and 3 would provide incremental improvement only, and would not result in corporate legal practitioners being able to provide legal services to all entities commonly found within a corporate group.

To help illustrate this, it may be helpful to consider section 4 of the Queensland Law Society's [Guidance Statement No. 15 - In-house counsel - practising certificates](#), dated 4 October 2018, which provides guidance in

relation to equivalent law in Queensland, and includes the following hypothetical company structure, noting that an in-house lawyer employed by A Pty Ltd would only be able to provide legal services to A Pty Ltd, B Pty Ltd, C Pty Ltd and D Pty Ltd:



The changes proposed in recommendations 2 and 3 would not necessarily allow the hypothetical in-house lawyer employed by A Pty Ltd to advise JV Pty Ltd, even if JV Pty Ltd and both joint venturers wanted this to occur, because “control” as defined under section 50AA of the Corporations Act doesn’t extend to joint control (see 50AA(3)). This example can be generalised to any joint venture that is not controlled by a single corporate group.

Nor would the recommended changes address the further observation of the Queensland Law Society that “[t]he above structure is only one example of issues that could arise and it is not hard to think of other corporate structures in which similar issues would arise for in-house counsel such as those involving trustee companies or legal service companies”.

Put differently, the proposed changes would reduce the size of the problem, but would not solve it. Corporate legal practitioners would be able to advise more entities than currently permitted, but would remain unable to advise all entities commonly found within a corporate group.

**Enabling corporate legal practitioners to provide legal services to all entities commonly found within a corporate group**

It would be greatly appreciated if the Legal Services Council reconsidered the nature of the drafting changes needed to enable corporate legal practitioners to advise all entities commonly found within a corporate group, and ultimately recommended drafting that fully achieves that objective.

One way in which this could be done would be to allow the employers of corporate legal practitioners to determine the extent of their corporate group, rather than seeking to prescriptively define the clients that an in-house counsel is permitted to advise. For example, the current definition could be amended as follows:

**corporate legal practitioner** means an Australian legal practitioner who engages in legal practice only in the capacity of an in-house lawyer for his or her employer or ~~a related entity~~ any other entity that the employer reasonably considers to be part of its corporate group, but does not include a government legal practitioner

A client-centric approach of this kind would let corporate legal practitioners advise any entity that their employers may reasonably expect them to advise, without permitting in-house lawyers to “advise anyone” in

the manner of a principal of a law practice. This approach would be consistent with the views expressed by the Victorian Legal Service Board in its [letter to 'in-house counsel' dated 17 April 2019](#).

An alternative approach, that would take an incremental step further than that proposed in the Consultation paper, would be to define "control" in the Uniform Law so that "joint control" is included rather than excluded. This would let a corporate legal practitioner advise entities that his or her employer's group controls jointly with third parties. This would further reduce, if not eliminate, the need for some in-house counsel to obtain principal practising certificates in order to advise all members of their employer's corporate group.

**No public policy objective would be advanced by maintaining restrictions on corporate legal practitioners that do not reflect modern practice**

Maintaining restrictions on corporate legal practitioners that do not reflect modern practice will preserve the status quo: many in-house counsel will continue to obtain principal practising certificates rather than corporate practising certificates.

No public policy objective would be advanced by this approach:

- The same lawyers would provide the same legal advice to the same clients.
- Red tape would be more than necessary, to the disadvantage of the consumers of in-house legal services.
- The public standing of the profession would not be advanced by in-house lawyers needing to continue to engage in what, in my experience, is seen as a necessary but inefficient 'work-around'.

Thank you again for the opportunity to comment on the proposed changes to the Uniform Law. Please contact me if you have any questions about this submission.

Kind regards,

**Laurence Mandie**  
Head of Legal  
CitiPower, Powercor and United Energy

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